> **adequate basis for action on our part.** Nor are we, in any case, in a position to know if such a policy on our part would in fact have the result intended of if, to the contrary, it would lead to increasing trade barriers in other areas . . . Which of these policies is the appropriate one in this situation is obviously a matter that does not come within the sphere of the ordinary concerns of this Commission. It is a matter which we believe is appropriately considered by other branches of the government.[34/]

In 1987, the Commission flirted with a proposal remarkably similar to the current NPRM. Without citing a jurisdictional basis, it issued a Notice of Inquiry and Proposed Rulemaking ("1987 NPRM"),[35/] seeking comment on "conditioning the grant of Sections 214 Certificates on the treatment of U.S. carriers in the home jurisdiction or franchise area of the foreign-owned carrier. . . ."[36/] The Executive Branch rejected the proposal unequivocally, declaring that international trade was not the province of the FCC. Specifically, in its April 17, 1987 comments, the Executive Branch stated:

> the provisions of the FCC's notice which inquire into the feasibility and desirability of adopting an international competitive "model," and the retaliatory procedures possibly associated with that approach, are matters of concern. Executive branch agencies are responsible for the development and implementation of U.S. trade policy under existing law. Regulatory agencies including the FCC may have a limited role to play, subject to the overall direction of the Executive branch, but there is no room under existing law -- nor should there be -- for unilateral initiatives undertaken by independent regulatory agencies in the trade policy field.[37/]

34/ Id. at 79 (emphasis added).

35/ 2 FCC Rcd 1022 (1987).

36/ Id. at 1033.

37/ Comments of National Telecommunications and Information Administration On Behalf of the U.S. Department of Commerce at 7 (Apr. 17, 1987) ("Executive Branch

(continued ...)

The Executive Branch further stated that any action that the FCC took must be consistent with the following two principles:

> [T]he U.S. must tailor its overall responses to foreign country practices to the nature and severity of those practices, the relationships with the countries involved, the extent of U.S. direct equity participation in the foreign market and foreign nationals' investments here, the status of regulatory and legislative efforts in individual countries, and U.S. international obligations. All of these factors, combined with sensitive ongoing bilateral and multilateral negotiations, must be synthesized into a coherent U.S. trade policy by the Executive branch agencies specifically charged with such responsibility.
>
> [Any action] taken to respond to foreign practices . . . must be undertaken by the Executive branch under the authority of [S]ection 301 of the Trade Act of 1974 or any other relevant statutes. This approach enables the U.S. to maintain a unified trade policy and the Executive branch to continue to exercise its responsibility for conducting trade and foreign policy of the United States. [38/]

A year later, the Executive Branch's concern was so strong that it felt it necessary in subsequent comments to reemphasize that:

> authority to formulate and implement U.S. trade policy is properly the domain of the Executive Branch. Moreover, we continue to oppose any interpretation of the FCC's authority which would allow for independent regulatory action based on trade policy grounds. Rather, actions taken by the Commission must be predicated on its authority under the Communications Act and based upon communications policy grounds.[39/]

37/ (... continued)
Comments"). The Executive Branch Comments were filed by NTIA in coordination with the Department of State, USTR, Department of Treasury, Department of Labor, Counsel of Economic Advisers and Office of Management and Budget.

38/ Id. at 8.

39/ Executive Branch Comments at 5 (filed May 20, 1988).

In response, the FCC withdrew its proposal to condition FAC entry on conditions in the FACs' home market.[40] The only new rule adopted in this proceeding was a regulation requiring FACs to file certain traffic and revenue reports. Even these reporting requirements triggered an Executive Branch objection on the grounds that they violated the U.S. policy of affording national treatment to foreign telecommunications investors.[41] The imposition of reporting requirements on foreign carriers cannot in any way serve as a precedent for the proposed rule, which seeks to impose substantive policy changes on foreign governments. But the fact that even reporting requirements could have interfered with the negotiating position of the Executive demonstrates how risky it is for the Commission to assert any jurisdiction in this field. Indeed, it is not unreasonable to conclude that Congress sought to resolve any ambiguity about who had responsibility for telecommunications trade policy arising out of this 1987 NPRM by enacting the TTA in 1988.[42] That act, of course, conferred authority over telecommunications trade matters unequivocally on the Executive Branch.

Neither AT&T nor the NPRM provide any authority to contradict the long tradition that the Executive Branch alone determines the U.S. negotiating position on telecommunications trade. The only decisions referred to in the NPRM discuss trade considerations in the course of protecting public interest goals that are unquestionably within its jurisdiction. Specifically, in AmericaTel, the FCC, in granting the AmericaTel/Entel application to transfer control of certain Section 214 authorizations,

40/ See Report and Order and Supplemental Notice of Inquiry, 4 FCC Rcd 7387, 7396 & 7428 (1988); see also Order on Reconsideration, 4 FCC Rcd 323, 336 (1989).

41/ See Order on Reconsideration, 4 FCC Rcd 330-31.

42/ 19 U.S.C. §§ 3101-3111 (Supp. 1994).

considered the openness of the Chilean telecommunications market.[43] It did so, however, not with an eye to influencing Chile's government or opening that market for U.S. service providers, but to determining whether the market conditions in Chile combined with the Commission's safeguards would prevent AmericaTel from obtaining an unfair competitive advantage over U.S. competitors:

> we find that current market conditions in Chile, Chile's regulatory regime, and the regulatory safeguards we impose as a condition of this authorization are sufficient to prevent [AmericaTel] from obtaining an unfair competitive advantage or any undue preferential treatment as a result of its affiliation with ENTEL-Chile. We conclude that entry by ENTEL-Chile will not present a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services.[44]

The Commission did not attempt to change Chile's telecommunications market or regulatory scheme. It merely concluded that given the conditions of the Chile market and regulatory structure, the competitive safeguards imposed on AmericaTel were sufficient. If the Commission had found that the Chile market and regulatory system were less developed, then it might have imposed more rigid competitive safeguards on AmericaTel.

Similarly, in the international interconnected private line resale proceedings, the FCC examined the limited question of whether U.S. carriers had equivalent opportunities to provide resale of interconnected private line services in the

[43] AmericaTel Corporation, 9 FCC Rcd 3993, 3997-4001 (1994) ("AmericaTel Order").

[44] Id. at 4001 (footnote omitted).

foreign country.[45] Here, too, however, the purpose of the inquiry was to safeguard the U.S. market.

The Commission's goal in permitting interconnected private line resale was to force downward pressure on accounting rates and U.S. calling rates. The Commission found that this goal would only be accomplished if there were equivalent opportunities for resale in both the United States and the foreign country. If resale were permitted on a "one-way" basis only,

> then the already significant U.S. net settlements deficit would increase, ultimately increasing the burden on the U.S. ratepayers through, for example, higher rates. Such a lop-sided effect would not benefit U.S. consumers. In light of these circumstances, we conclude that "one-way" resale would be detrimental to the U.S. public interest.[46]

Therefore, the Commission's examination of a foreign market was tied directly to protecting U.S. consumer interests.

In short, the FCC has only the most limited authority to take actions relating to foreign government telecommunications policies. It has full authority to protect and improve the U.S. market for U.S. consumers, but this authority cannot justify efforts to influence the behavior of foreign governments or to conduct explicit or implicit foreign trade negotiations. Such efforts violate the constitutional and statutory framework that governs the making of foreign policy, including foreign telecommunications trade policy.

45/ See Regulation of International Accounting Rates ("International Resale Order"), 7 FCC Rcd 559 (1992); ACC Global Corp., 9 FCC Rcd 6240, 6246-49 (1994); fONOROLA/EMI Order, 7 FCC Rcd 7312 (1992).

46/ International Resale Order, 7 FCC Rcd at 561.

D. Multilateral Negotiations Are Already Under Way

The risk this proposed rule poses to a unified American negotiating front is not an academic point. The Commission's proposed rule will endanger ongoing negotiations to open foreign markets.

1. Background

Telecommunications has been considered a vital subject for U.S. trade negotiators since the mid-1980s. The Uruguay Round of GATT negotiations, begun in 1986, included a strong U.S. effort to cover trade in services for the first time. The United States succeeded in gaining adoption of the General Agreement on Trade in Services ("GATS"), including an Annex on telecommunications that addresses many of the issues that the proposed rule is intended to address -- nondiscriminatory access, publicly available tariffs, conditions, and technical requirements for connection to the network.[47/] At the same time, the Annex expressly allows member states to impose conditions on access to the network that are necessary to safeguard universal service and technical integrity. Finally, many of the basic telecommunications services to which these commitments will apply are, in essence, left to be identified in future negotiations.

At bottom, the telecommunications negotiators were unable to agree on the principles that the United States preferred during the Uruguay Round. Rather than give up, the countries concerned -- most of the significant markets of the world -- agreed to form a Negotiating Group on Basic Telecommunications ("NGBT") to conduct "comprehensive" negotiations on "progressive liberalization of trade in

47/ General Agreement on Trade in Services, Annex on Telecommunications, ¶¶ 4, 5, Final Act Embodying Results of the Uruguay Round of Multilateral Trade Negotiations (April 15, 1994), reprinted in H.R. Doc. No. 313, 103d Cong., 2d Sess., vol. 1 at 1617-1618 (1994).

telecommunications transport networks and services." The NGBT "shall conclude these negotiations and make a final report no later than 30 April 1996."

The U.S. Executive Branch is wholly committed to the NGBT process. As Vice President Al Gore stated at the recent G-7 Ministerial Conference:

> [W]e . . . recognize that the information society demands more than a piecemeal approach. The governments represented here and others have an historic opportunity to open telecommunications markets around the world in the negotiations within the General Agreement on Trade in Services. . . .
>
> Let us resolve to meet this deadline to remove our investment barriers together.[48/]

2. MFN

In essence, this NGBT represents a further opportunity for the United States to use its leverage and persuasion to open foreign telecommunications markets. If it is not satisfied, the United States has expressly reserved its right to take an exemption to Most Favored Nation obligations.[49/] This is a powerful negotiating tool but one with serious consequences. Most Favored Nation treatment -- under which a country must afford to all other member countries the same trade concessions or benefits that it negotiates with any single member -- has been the cornerstone of multilateral trade structures since World War II. Any decision to take such an exemption would likely have repercussions not only in the telecommunications sector, but also in the entire multilateral trade arena. Thus, such a decision must be made by

48/ Vice President Al Gore, Remarks at G-7 Ministerial Conference in Brussels, Belgium 4 (Feb. 25, 1995).

49/ Statement of Administrative Action and Required Supporting Statements (Sept. 27, 1994), Final Act Embodying Results of the Uruguay Round of Multilateral Trade Negotiations (April 15, 1994), reprinted in H.R. Doc. No. 313 supra note 47 at 978.

the Branch that has the authority, expertise, and experience to carefully weigh its costs and benefits. The Executive Branch is the only branch with these credentials.

The Commission's adoption of the proposed rule would directly interfere with the Executive Branch's role by adopting a MFN exemption before the GATS negotiations have been completed. It would also limit the negotiating ability of the U.S. negotiators. For example, the United States may negotiate an acceptable liberalization arrangement that applies to most but not all NGBT members. (It is not uncommon, for example, to allow developing countries exemptions or delays in meeting global trade liberalization obligations.) If, to close a multilateral deal, the USTR wants to promise that it will not take an MFN exemption, the FCC's proposed rule would prevent it from making such a promise. The rule, which says "we will open our market to a country only if that country opens its market," would not permit the Executive Branch to afford MFN to those countries that are not bound to provide reciprocal treatment. The rule thus undermines the U.S. negotiating credibility within the NGBT process as well as posing a threat to multilateral trade structures generally.

3. Standstill Agreement

Indeed, even the Commission's proposal could have adverse consequences on the NGBT process. Negotiations have already begun. As agreed in the Uruguay Round, the NGT "shall conclude these negotiations and make a final report no later than 30 April 1996."[50/] While these negotiations are underway, however, the parties -- including the United States -- have agreed to a "standstill" on measures designed to increase their negotiating leverage. Until April 30, 1996, **"it is understood that no participant shall apply any measure affecting trade in basic**

[50/] Decision on Negotiations on Basic Telecommunications, ¶ 5, reprinted in H.R. Doc. No. 313 supra note 47 at 1706.

telecommunications in such a manner as would improve its negotiating position and leverage."[51/]

The proposed rule flatly violates this commitment. There is simply no justification for the Commission's proposed rule other than to **"improve [the U.S.] negotiating position and leverage."** Certainly the other members of the NGBT will see it that way. Indeed, just the act of publishing the proposal could reasonably be viewed as a measure designed to improve U.S. leverage in these talks.

One could hardly imagine a better example of why the Commission is barred from the trade negotiating business. U.S. negotiators concluded during the Uruguay Round that they could not achieve, with all the leverage of the U.S. government and market behind them, the kind of results that the proposed rule seems to envision falling from the tree as soon as the Commission gives it a good shake. The U.S. negotiators nonetheless agreed to keep talking without resorting to threats of market closure. The negotiations may fail and they may succeed, but whether and when to issue a threat to close the U.S. market is an issue that must be decided exclusively by the Executive Branch.

III. THE PROPOSED RULE WOULD NOT PROMOTE OPEN ENTRY

Even if the Commission had authority to issue the proposed rule, doing so would be highly improvident, for one simple reason. The proposed rule would not accomplish its professed goal.

First, liberalization of telecommunications service in other countries is driven by many forces, all more powerful than international trade concerns. **Second**, even if international trade concerns were the driving force in other governments'

51/ Id. ¶ 7.

telecommunications policies, the Commission's proposed rule offers astonishingly little incentive for foreign governments to accept the bargain the Commission offers. And **third**, striking an international bargain on telecommunications trade will require international bargaining, a process from which the Commission is barred. The end result of the rule will not be to open other markets but to close the American market, with adverse consequences for both consumers and the Commission itself.

A. Telecommunications Liberalization In Other Countries Is Driven By Forces More Powerful Than International Trade Reciprocity

1. Liberalization Is Occurring Rapidly Without Prodding from the Commission

If international trade concerns played the principal role in other governments' decisions to liberalize their telecommunications markets, one would expect to see governments delaying their liberalization to extract concessions from other countries as part of an international negotiation. Quite the reverse is true. Telecommunications liberalization is already occurring almost everywhere, without the spur that the proposed rule seeks to apply.

The United States has played a vital role in this process, but for reasons quite different from those behind the proposed rule. By boldly leaping into a world of telecommunications competition, the United States has demonstrated the immense value of such a policy. The flood of new products and services available in the United States at ever-decreasing prices, and the productivity gains that this makes possible for all parts of the American economy -- these are the best incentives for liberalization abroad.

a. European Union

A detailed look at European telecommunications policy shows the remarkable force of the United States example. The European Union ("EU") has set

January 1, 1998, as the deadline to liberalize voice telephony services throughout the Union,[52] and it has set January 1, 1996 -- less than a year from now -- as the deadline for working out the details for this liberalization.[53] The EU has realized that restricting the use of telecommunications infrastructure impedes the development of European networks and services,[54] a guiding principle which states that "provided the necessary safeguards are in place, the providers of telecommunication services which are open to competition should have a free choice of underlying infrastructure for delivery of such services."[55]

And the European Commission has already published proposals that would create telecommunications competition throughout Europe. The proposals would allow for open access and interconnection to preexisting telecommunication infrastructures,[56] establish common principles for universal service,[57] implement safeguards with respect to infrastructure competition,[58] and establish nondiscriminatory procedures to open up other areas, such as "rights of way,"[59] for the successful

[52] European Council Resolution 93/C 213/01, 1993 O.J. (C#213); see also European Commission Green Paper On the Liberalisation of Telecommunications Infrastructure And Cable Television Networks: Part One, 10 (Oct. 25, 1994) ("Green Paper Part I").

[53] Id. at 34 n.60.

[54] Id. at 35.

[55] European Commission Green Paper On the Liberalisation of Telecommunications Infrastructure And Cable Television Networks: Part II, ii (Jan. 25, 1995) (citation omitted) ("Green Paper Part II").

[56] Id. at 70-78.

[57] Id. at 41-47.

[58] Id. at 92-103.

[59] Id. at 103-08.

development of a competitive telecommunications market. The European Council intends to finalize the telecommunications infrastructure proposals later this year.[60/] Though they may yet be modified, the publication of these proposals and the rapid timetable show the strength of the European movement to liberalize telecommunications services and infrastructure. In fact, what is most remarkable about the proposals under consideration is the extent to which they reflect policies also encouraged by the proposed rule's six-point test.[61/]

First, on the question of effective access for U.S. competitors, the EU has proposed complete liberalization of European telecommunications, including voice telephony services, by January 1, 1998.

Second, the EU has proposed to institute competitive safeguards to ensure that telecommunications competition is maintained. Among these safeguards are: (1) objective criteria for interconnection; (2) close monitoring to ensure that access is not provided in a discriminatory or unreasonable fashion; and (3) close monitoring of cross ownership of networks and services through transparent accounting procedures and the separation of accounts.[62/]

Third, the EU has proposed to make available published, nondiscriminatory charges, terms, and conditions for the interconnection to telecommunication networks throughout the EU.[63/] The unreasonable refusal of interconnection or unjustified charges on interconnection will not be tolerated.

60/ Id. at 128.

61/ NPRM ¶ 40.

62/ Green Paper Part II, supra note 55 at 72-74, 93.

63/ Id. at 74.

Fourth, the EU has introduced a proposal that would require that conditions of access be "transparent and published in an appropriate manner."[64]

Fifth, in regard to the protection of carrier and customer proprietary information, the EU has stated that "[t]he need for adequate data protection should also be taken into account in developing future network standards."[65] As such, the EU wants any infrastructure resolution in this area to "provide [for] a clear framework for effective data security, storage, processing and privacy.[66]

Sixth, in order to be consistent with the EU's proposed requirements of objectivity and nondiscrimination, it is likely that each member state will need to create or utilize an existing body to regulate interconnection and licensing of telecommunications carriers. In addition, the EU itself will continue to have an important regulatory role.

In short, if implemented on schedule, the EU's proposals would largely meet the Commission's requirements for effective market access by the end of 1997.

b. Spain

Further evidence that the proposed rule is not needed to spur the general process of liberalization may be found in Spain. When the EU set January 1, 1998 as the deadline for full liberalization of telecommunication services, the EU allowed several

64/ Id. at 73.

65/ Id. at 108.

66/ Id.

member countries with "less developed networks," including Spain, an additional five years to comply.[67] But Spain has decided to meet the 1998 deadline anyway.[68]

The Spanish government has set a three year timetable for liberalizing cable television, mobile phones and local television broadcasting.[69] And, by January 1, 1998, the country also plans to liberalize basic voice services.[70]

Spain has already taken concrete steps toward liberalization. In 1994, Spain awarded a second nationwide digital GSM license to an international consortium headed by AirTouch.[71] As Commerce Secretary Brown observed on a recent visit, "'there'll be no turning back on the reform programme,'" in Spain.[72] There is little doubt that Spain, like its fellow European member states, is moving rapidly toward a liberalized telecommunications market without prodding from the FCC.

2. The Forces Slowing Liberalization Are Beyond the Commission's Reach

Of course, European liberalization does not conform to every jot and tittle of the Commission's preferred policy. One possible justification for the proposed rule is that it might lure Europe closer to the Commission's preferred policy options. We will

67/ Green Paper Part I, supra note 52, at 12 n.4; Green Paper Part II at 88. Greece, Ireland and Portugal were also granted this five-year "grace period."

68/ *Spainto Liberalize Telecom Market Five Years Ahead of Its 2003 Deadline*, Wall St. J., Oct. 10, 1994, at A9D.

69/ Id.

70/ Id.

71/ Several other U.S. carriers participated in the bidding for this license. However, AT&T did not. AT&T is one of the leading equipment manufacturers, with two plants in Spain.

72/ *U.S. hopes Spanish reforms will continue - Brown*, Reuters News Service, Feb. 27, 1995 (quoting Secretary Brown).

discuss shortly the remarkably small size of the carrot the Commission has offered, but it is first worthwhile to note the difficulty of influencing the telecommunications policy debate in other countries.

Telecommunications services policy has never been driven by international trade concerns. Traditionally, most service markets have been closed not just to foreign competition but to all competition. The resulting monopolies have served many purposes. Monopoly pricing allowed countries to charge high prices to business and long-distance consumers while subsidizing many local consumers in the interest of promoting universal service. What was in essence a tax and subsidy scheme could be implemented without much public debate because it was largely invisible in the monopoly carrier's rate schedule.

Liberalization of telecommunications service invariably brings both taxes and subsidies to the fore and requires governments to consider anew the extent to which universal service should be underwritten, and which activities should taxed to do so. Liberalization also poses a challenge to the former monopoly carrier, which is often among the largest employers in the nation. The downsizing and organizational changes needed to meet new competition are often painful. A host of other difficult issues accompany liberalization. Will local service be deregulated along with long distance? How much protection should be given to the existing telephone company as it slims down to meet competition? How much foreign ownership is appropriate in an industry so vital to national security?

These are not issues that the United States has resolved entirely, despite more than a decade of liberalization efforts, and we should not expect other countries to address them more quickly than we. Nor should we expect that the play of powerful political constituencies aroused by liberalization will yield precisely the same answer in every country. Insisting that detailed American prescriptions be adopted by other jurisdictions is more likely to provoke conflict than accommodation. Indeed, one need only imagine the American response if the European Union insisted that the U.S. Executive Branch surrender all of its authority over cable landing licenses to the independent FCC.

In short, the Commission's prescriptions for good government in other lands are likely to have limited impact.

B. The Proposed Rule Offers Little Incentive for Liberalization

The incentives that the Commission will offer to other countries are also limited. This is in stark contrast to Section 301 of the Trade Act, under which the Executive Branch typically seeks to create a mismatch between what the United States wants and the retaliation that it threatens. Thus, in the recent dispute over intellectual property with China, the United States proposed cutting off $1 billion in Chinese imports; but to avoid retaliation, all China had to do was agree to enforce more vigorously laws that it had already enacted. The policy changes demanded by the United States were far less costly than the effects of retaliation.

1. The Limited Value Of The Incentive

None of that is true for the NPRM. First, the proposed rule does not offer much incentive to foreign carriers or foreign governments. Under the proposed rule, a FAC could enter the U.S. market and provide facilities-based domestic interexchange services and switched international resale services,[73/] but it could not provide facilities-based international services. As a result, the FAC will face increased costs for provision of international services. It would not be completely excluded; more than 125 different companies currently provide such international services on a resale basis

[73/] NPRM ¶¶ 74, 81

in the United States.[74] This cost penalty may hurt the FAC, and it will certainly restrain competition in the U.S. market, but is unlikely to provide any significant independent pressure on a foreign carrier or its home government to change their positions on telecommunications restructuring in the home country.

2. The Uncertainty Of The Six-Part Test

Even if the prospect of reduced costs for international services were highly alluring, the proposed rule offers no certainty that policy changes in a foreign carrier's home market would result in favorable treatment in the U.S. market. No one knows what weight would be given to each factor, and each of the factors is itself open to interpretation. It is a near certainty that AT&T would intervene in every proceeding to urge strict readings of each factor -- readings likely to surprise the foreign carrier and perhaps even the Commission itself. Endless debates can occur about each factor. For example, what constitutes an independent regulatory body? Of whom must this body be independent? Must the foreign carrier prove this independence? Does the Commission require a showing of independence as a matter of law or as a matter of fact? If independence in fact is the test, what are the indicia of independence? If a U.S. carrier does not like a decision of a foreign regulatory body, may it challenge the foreign regulators' "independence" before the FCC? Just interpreting this one factor is grist for many lengthy proceedings.

Few, if any, countries could meet a strict application of all six parts of this test. For example, even Canada and the United Kingdom, the two countries for which Commission has approved interconnected private line resale,[75] would presumably fail

[74] FCC, Statistics Of Communications Common Carriers, Table 4.8, at 203 (1993-94) ("1993-94 Common Carrier Statistics").

[75] NPRM ¶ 10 (footnote omitted).

this test because neither country permits U.S. carriers to offer international facilities-based services in their country.[76/]

Indeed, the rule could reasonably be interpreted so that even the United States fails the proposed six-part test. For example, the U.S. has only limited federal requirements for carriers to protect carrier and customer proprietary information. The only current regulations protecting customer proprietary information relate to the provision of enhanced services to subscribing customers and public cellular radio services.[77/] These regulations are quite limited in their scope, and for the most part, only apply to the RBOCs, and not to other local telephone service providers or to interexchange and international carriers. Moreover, the scope of interconnection requirements and other issues implicated by the proposed test are still subject to heated and protracted legislative and regulatory proceedings that will never satisfy all concerned parties.

3. The Six-Part Test Is Not The End Of The Uncertainty

Finally, even if it were possible for a foreign carrier to be sure of passing the six-part test, it still would have no certainty that it would be allowed to compete on even terms in the United States. It still would face highly discretionary and uncertain inquiries into such issues as "the status of the foreign carrier as a government or non-government entity" and "national security implications," followed by a solicitation of "the views of the Executive Branch on the proposed foreign carrier's entry into the

76/ Canada permits U.S. carriers to provide facilities-based services from Canada to the United States, but not to overseas locations.

The one country that appears to meet the Commission's proposed test is Chile. There are several U.S.-affiliated carriers that currently provide international facilities-based services in Chile. In addition, Chile has extensive facilities-based competition in every sector of its telecommunications industry, including local service.

77/ See 47 C.F.R. §§ 22.901, 64.702 (1994).

U.S. market."[78] In the end, then, foreign carriers that help to open their markets at home may get the equivalent of a gold star from the Commission, but they will not have a guarantee of access.

4. Even Without Uncertainty, The Value Of This Bargain Is In Doubt

This uncertainty simply compounds the unattractiveness of an already unappealing bargain. True enough, the U.S. market is a strong one, and many foreign companies seek to be part of it. But no one knows how well foreign companies can expect to do here. (In 1993, foreign carriers had a 0.1% share of the U.S. market for facilities-based international telecommunications.)[79] As in any competitive market, returns on capital could be low -- or even negative.

In contrast, for foreign carriers with monopolies at home, liberalization will mean an end to assured returns on the vast bulk of their investment. Yet the proposed rule urges foreign carriers to give up those assured returns simply in order to get a chance to make a far more speculative investment in the United States. To judge how that bargain looks to most foreign companies, one need only ask whether the lengthy and bitter AT&T antitrust case would have been rendered unnecessary if the European Union had told AT&T that agreeing to the breakup would be treated as "a positive factor" in deciding whether to let AT&T into the European equipment market. Or whether the RBOCs would abandon their resistance to local telephone competition if the Japanese government said that by doing so they would improve their chances of being allowed to offer services in Japan.

78/ NPRM ¶ 45.

79/ 1993-94 Common Carrier Statistics, at Table 4.9 at 204.

5. The Proposed Bargain Is Addressed To The Wrong Parties

Finally, even if foreign companies were persuaded by this one-sided proposal, they could not implement it. The policies demanded by the proposed rule must be implemented by governments, not the companies that want to enter the U.S. market. But helping its telephone company expand abroad will be a fairly modest incentive for a foreign government to make the major policy changes demanded by the Commission. Again, one need only ask how politically persuasive it would be for Bell South to tell Congress, "We'd like you to adopt this six-part regulatory plan proposed by Chile -- so we can spend more of our money improving telephone service in Chile."

In short, the proposed rule is about as likely to open foreign markets as burial insurance is to encourage premature death.

C. The Commission's Proposed Rule Will Not Work Unless the Commission Is Willing and Able to Negotiate With Other Nations -- And It Is Not

The more likely effect is that other countries will demonstrate their unwillingness to dance to an American tune by putting in place similar "reciprocity" principles, thus preventing both the United States and its trading partners from fully liberalizing their markets. Of course, many countries have already copied the U.S. foreign-ownership provisions in Section 310(b). These restrictions typically hurt U.S. firms more than their foreign counterparts. For example, while it is unlikely that a Portuguese carrier would be a major player in the U.S. PCS auctions, AirTouch is precluded from owning more than 25% of its cellular franchise in Portugal.

Indeed, on the important question of American access to the European telecommunications market, the risk of such a result is already apparent. On the one hand, the EU has not proposed a limit on access by non-EU countries,[80/] and it has stated that: "[m]ultilateral negotiations provide the best way of achieving a balanced set of commitments in all services sectors, along with the establishment of international trading rules."[81/] On the other hand, pending the outcome of multilateral negotiations, the EU has reserved its right to "maintain equivalent conditions to those currently prevailing in third country markets with regard to market entry or the licensing of non-EU or EEA nationals or companies controlled by such nationals."[82/] This policy, combined with the Commission's proposed rule, has the obvious potential to create an EU-U.S. "stalemate," in which neither side will make the first move to liberalize its telecommunications markets for the other.

Indeed, the outcome could be worse than a stalemate because U.S. companies could lose some of the gains they have already made if other countries adopted the proposed rule. For example, if Canada adopted this rule it would examine the worldwide activities of AT&T, GTE and other U.S. carriers that currently have significant investments in Canadian carriers providing international service to the United States. Canada could conclude that countries in which AT&T (Ukraine, Venezuela) and GTE (Dominican Republic, Venezuela) have investments do not meet the six-part test.

80/ Quite the contrary, the EU has stated that:

> Whilst some Member States have in place legislation which may be used to limit the possibilities for foreign companies to invest in telecommunications ventures or to provide services, the EC Treaty does not generally allow the discrimination between EC-owned companies and non-EC owned companies established in the Community.

Green Paper Part II, supra note 55, at 101.

81/ Id. at 99-100.

82/ Id. at 101.

Canada could then limit the international services offered by carriers affiliated with AT&T and GTE. If other countries adopted this proposed rule, telecommunications services trade worldwide could quickly spiral down to the lowest common denominator.

The only way in which the proposed rule could serve as a bargaining chip for liberalization -- rather than a recipe for stalemate -- is if the Commission were willing and able to negotiate with other countries about how much of its six-part test will be implemented in exchange for how much access. But such negotiations would violate the Constitution. And, in any event, nothing in the Commission's past practice or its ways of reaching decisions makes it fit for negotiating market entry issues with foreign governments. In many cases, bargaining over market entry may be seen as improper ex parte contacts, or as prejudging cases not yet before the Commission. In others, it is hard to know who could speak for the Commission, since its policies may reflect the votes of a shifting majority.[83/]

Would the proposed rule be useful to negotiators from the Executive Branch? No, for two reasons. **First**, to make the rule useful it would have to be rewritten to abandon any pretense that the Commission will exercise independent judgment in its administration, for foreign nations will not be inclined to deal with a Executive Branch negotiator who does not have full authority to reach a binding bargain. **Second**, the Executive Branch doesn't need the leverage implicit in the proposed rule. As we have seen, the TTA already gives the Executive Branch sweeping authority to close U.S. markets.

83/ Negotiating entry issues in contested Section 214 proceedings is very different from resolving international interference issues and similar matters.

D. The Proposed Rule Would Produce Not Liberalization But Stalemate and Closed Markets

So the proposed rule is almost certain to fail in its purpose. But it will not be simply futile. It will be worse than that. The Commission properly criticizes AT&T because "[t]he AT&T test would require that the regulations and market structure of the foreign country mimic those of the United States. Such a strict test would be impossible to meet, and thus would not encourage open markets."[84/] The proposed rule suffers from the same defects. It "would be impossible to meet" this ideal FCC standard. Even if the Commission intends to administer the rule in a non-protectionist fashion, it is likely to create a near-permanent bar to foreign investment in U.S. international telecommunications facilities.

This is because, when a market is closed, uncompetitive companies and comfortable oligopolies always lobby hard to keep it closed. The Commission's hope that the proposed rule may ease its administrative burden,[85/] will also prove entirely misplaced. Every effort on the part of the Commission to reward foreign governments for liberalization will be challenged; each vague factor will be fly-specked to find some flaw in the foreign government's liberalization so as to justify continued protection. And even after the Commission finds a deserving foreign carrier, its decision will often be challenged in court and sometimes reversed in Congress.

The Commission devoted significant resources to the TLD Acquisition Order, AmericaTel and BT/MCI. But, the proposed rule could have required a much more extensive examination in each of those decisions. Moreover, the proposed rule

84/ NPRM ¶ 41.

85/ NPRM ¶ 32.

would repeat the same examination for each international facilities-based Section 214 application filed by these and other carriers.

In short, while the proposed rule would do little or nothing to open foreign markets, it is likely to turn the Commission into a permanent forum for protectionism. And for what? It will no doubt be a good thing for the world economy if American companies are able to invest in the telecommunications infrastructure of other countries. But there is reason to doubt that such investment will offer any great benefits to the United States and its citizens. The amounts American companies invest in foreign infrastructure may reduce their investments in the United States. Yet it is investments in the United States that create jobs and improve service in this country. Thus, the gains to the U.S. economy will be small even if the rule succeeds. And if the rule fails, the harm will be significant, for the proposed rule will deny foreign carriers the opportunity to make investments that could create jobs and improve services here.

IV. THE PROPOSED RULE IS NOT NEEDED BECAUSE CURRENT SAFEGUARDS ARE SUFFICIENT

Under current Commission policy, FACs are permitted to offer international facilities-based services subject to competitive safeguards. This open-entry policy has promoted competition and permitted U.S. carriers to utilize foreign capital while preventing any competitive abuses. In order to justify a departure from the current open-entry policy that yields important competitive benefits, there should be substantial evidence of competitive abuses that injure competition in the U.S. market. However, AT&T has not offered any such evidence of actual competitive injury.

Indeed, the Commission has previously concluded that it should permit foreign-affiliated carriers to enter the U.S. market, over AT&T's opposition, because the

FCC's safeguards have proven effective. In addition, empirical evidence establishes that FACs have no unfair competitive advantage over U.S. carriers.

A. The Commission Has Already Properly Concluded That Its Competitive Safeguards Are Sufficient To Prevent FACs From Getting An Unfair Competitive Advantage

TI's acquisition of 79% of TLD was conditioned on numerous safeguards. These safeguards, many of which were suggested by the Executive Branch, included: (1) dominant carrier status on all international routes: (2) requiring FCC approval to transfer capacity, ownership or cable landing licenses for international cables; (3) requiring FCC approval to interconnect international cables; (4) requiring that TLD provide competing U.S. carriers access to its international facilities on a non-discriminatory basis; (5) prohibiting TLD from accepting special concessions directly or indirectly from any foreign carrier or administration; (6) prohibiting TLD from routing traffic to or from third countries for which it is not authorized to serve; (7) prohibiting TLD from bargaining for, or accepting more than its proportionate share of return traffic from any country; and (8) requiring TLD to seek Commission authorization before adding or deleting circuits to certificated points.[86/] The transactions approved in AmericaTel and BT/MCI were also both conditioned on adoption of similar competitive safeguards.[87/]

In addition to the competitive safeguards imposed on FACs, the Commission's International Settlements Policy ("ISP")[88/] provides further important

86/ TLD Acquisition Order, 8 FCC Rcd at 116-17.

87/ BT/MCI Declaratory Ruling, 9 FCC Rcd 3960 (1994) ("BT/MCI"); AmericaTel Order, 9 FCC Rcd 3993 (1994).

88/ See Implementation and Scope of Uniform Settlements Policy for Parallel

(continued ...)